

U.S. COURTS
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

RECUPEROS, LLC, and Idaho
limited liability company,

Plaintiff,

v.

AMERICAN FOOD STORES,
LLC, a California limited liability
company,

Defendant.

Case No. CV-04-229-S-BLW

**MEMORANDUM DECISION
AND ORDER**

The Court has before it Plaintiff's Motion for Preliminary Injunction and Expungement of Lis Pendens. Plaintiff asks the Court to remove lis pendens recorded by the Defendant in the state of Colorado and to issue an Order of Expungement. Plaintiff has not cited, and research has not revealed, any authority that would permit the Court to order officials in the state of Colorado to remove or expunge these lis pendens. Therefore, the Court will not enter such an order, but will leave Plaintiff to pursue such relief in the Colorado courts.¹ Plaintiff also

¹ A Motion to Release Lis Pendens is an appropriate way to challenge an allegedly improper lis pendens. Colo.R.Civ.P., Rule 105(f).

requests that the Court issue a Preliminary Injunction requiring the Defendant to release and remove the recorded lis pendens. With regard to this request, the Court finds, based upon its review of the Affidavits submitted by the parties, the parties' admissions during the telephonic hearing on the Motion, the filings in this action, and the Colorado lis pendens statute,² that the Defendant improperly recorded the lis pendens. However, the Court cannot issue a preliminary injunction compelling the Defendant to withdraw the lis pendens because the Plaintiff cannot show that it will suffer irreparable injury if the lis pendens are not released.

Colorado law governs all procedures relating to filing a notice of lis pendens relating to a federal lawsuit, including those procedures pertaining to its release. *Alien, Inc. v. Futterman*, 924 P.2d 1063, 1070 (Colo. App. 1995). In Colorado, a notice of lis pendens only may be filed "in an action . . . wherein relief is claimed *affecting the title to real property* (Emphasis added)." Section 38-35-110(1), C.R.S.

² There is no substantive federal lis pendens law. Instead Congress has provided that notice of pending federal court actions concerning real property is to be governed by the law of the state in which the property is located. *Alien, Inc. v. Futterman*, 924 P.2d at 1070. Under 28 U.S.C. § 1964, where parties in a federal court action claim an interest in real property which is located in a state which has a lis pendens statute, there must be compliance with that statute in order to give constructive notice of the federal court action. *Winkler v. Andrus*, 614 F.2d 707, 712 (1980).

Here, the action filed in this Court and from which the lis pendens purportedly arises does not affect title to real property. Each of Defendant's recorded lis pendens states that "a civil action has been commenced and is pending in the court named above wherein the parties named above have each asserted a claim affecting the title to real property" This assertion finds no support in the record. On its face, Plaintiff's Verified Complaint does not affect title to any of the properties against which Defendant has recorded lis pendens. Nothing in Mr. Kapur's Affidavit nor Defendant's Objection to Plaintiff's Motion supports a finding that the underlying action affects title to real property. Defendant's demand letter, which precipitated the Declaratory Judgment Action filed in this Court, only claims a right to a deposit. Moreover, at the telephonic hearing Defendant's counsel conceded that, at present, there is no legal basis for the lis pendens recorded by Defendant. However, Defendant's counsel also stated that Defendants' Answer and Counterclaim, which are due on July 9, 2004, would provide a legally sufficient basis for the recording of these lis pendens. Such an argument is misguided. It is inappropriate to record lis pendens in the mere anticipation that a legal basis will be established in the future; lis pendens must have a proper legal basis at the time they are recorded. Since the Defendant's Answer and Counterclaim are not presently before the Court, the Court makes no

finding regarding whether these pleadings, once filed, will be sufficient to establish a legal basis for the subsequent recording of lis pendens. It is clear, however, that the lis pendens now recorded do not meet the requirements of the Colorado statute. Therefore, the Court finds that the Defendant improperly filed lis pendens on the properties described in the documents attached as Exhibit B to Mr. Naeve's Affidavit (Docket No. 10).

Originally, Plaintiff had argued that the recorded lis pendens were threatening a transaction whereby it was to sell certain properties to a new buyer and that it would suffer immediate and substantial damage from the loss of the sale. However, at the hearing, Plaintiff's counsel advised the Court that the sale of the subject properties had closed and conceded that it could no longer claim irreparable harm.³ Accordingly, the Court will deny Plaintiff's Motion for a Preliminary

³ A moving party is entitled to a preliminary injunction if it demonstrates that it is likely to succeed on the merits and may suffer irreparable injury, or that serious questions exist on the merits and the balance of hardships tips in its favor. *See Self-Realization Fellowship Church v. Ananda*, 59 F.3d 902, 913 (9th Cir. 1995). The two tests are not separate but represent a sliding scale in which the required probability of success on the merits decreases as the degree of harm increases. *Id.* "Under any formulation of the test, the plaintiff must demonstrate that there exists a significant threat of irreparable injury." *Oakland Tribune, Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374, 1376 (9th Cir.1985).

Injunction.⁴

Although the requirements of Federal Rule of Civil Procedure 56 do not permit the Court to treat Plaintiff's Motion as one for summary judgment⁵, Plaintiff is not without recourse as it may petition the Colorado court for an order removing the illegally filed Notices of Lis Pendens⁶, or may file an Amended Complaint in this action should it sustain damages as a result of Defendant's improper recording

⁴ Defendant has moved to strike Paragraph 9 of Mr. Naeve's Affidavit wherein Mr. Naeve asserted that the Notices of Lis Pendens "have caused, are causing and will continue to cause the Plaintiff immediate, substantial and irreparable harm." However, inasmuch as the sale between Plaintiff and the new buyer has closed and Plaintiff has abandoned its claim of irreparable harm, the motion to strike is moot.

⁵ Rule 56 of the Federal Rules of Civil Procedure provides:

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

⁶ See *Kerns v. Kerns*, 53 P.3d 1157, 1164 FN 4 (2002)("We acknowledge that there are serious consequences flowing from the filing of a lis pendens. . . .[I]f a notice of lis pendens is improperly recorded, we note that section 28-35-204, 10 C.R.S. (2001) authorizes an action to expunge a "spurious" notice of lis pendens, and award the costs and attorneys fees associated with such an action to the prevailing party. . . .)

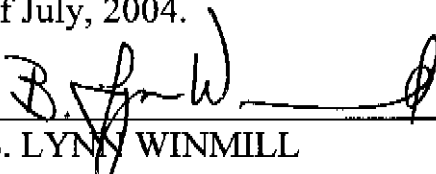
of the lis pendens.

Accordingly,

IT IS HEREBY ORDERED that Plaintiff's Motion for Preliminary Injunction and Expungement of Lis Pendens (Docket No. 8) is DENIED.

IT IS FURTHER ORDERED that Defendant's Motion to Strike Affidavit of Brian Naeve (Docket No. 14) is DENIED AS MOOT.

Dated this 2nd day of July, 2004.



B. LYNN WINMILL
Chief Judge, United States District Court

United States District Court
for the
District of Idaho
July 2, 2004

* * CLERK'S CERTIFICATE OF MAILING * *

Re: 1:04-cv-00229

I certify that I caused a copy of the attached document to be mailed or faxed to the following named persons:

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☐ Magistrate Judge Mikel H. Williams

Visiting Judges:
☐ Judge David O. Carter
☐ Judge John C. Coughenour
☐ Judge Thomas S. Zilly

Cameron S. Burke, Clerk

Date: 7-2-04

BY: 
(Deputy Clerk)